Supreme Court, U.S.
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No. 94-534

In The

Supreme Court of the United States

October Term, 1994

ALFREDO OLIVAS,

Petitioner,

v.

RICHARD BOEH, an agent of the Federal Bureau of Investigation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER IN REPLY

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BRIEF FOR PETITIONER IN REPLY

The respondent opposes the Petition on the grounds that the decision below faithfully applied this Court's decision in *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (Br. at 5-6) and is not in conflict with a decision of any other circuit court (Br. at 5), and that, in any event, the issues presented for review are moot. (Br. at 7-8.) Because neither of these contentions is correct, for the reasons set forth in the Petition, this Court should grant certiorari.

1. Contrary to respondent's contention, the decision of the court below neither applies any decision of this Court, faithfully or otherwise, nor does it at all deal with the very narrow issues presented to the court below or to this Court. Instead, the court below, as is set forth in Judge Norris' dissent, framed the issue on narrow procedural grounds, and then decided the case not on the issues raised by petitioner

but rather decided the procedural issues it constructed and avoided the issues that were tendered to it.

The court below ruled only that, in seeking to adduce respondent's testimony, petitioner did it the wrong way – he sought the testimony with a subpoena, and he should have used a different method to seek the testimony.

The court below never reached the substantive issues before it, to wit, did the *district court* – not the petitioner – (1) have the power to order respondent to advise the district court to disclose to the district court, on the record to be sealed, not under oath, and *in camera*, information required by the court to inform its decision how to proceed with the trial then in progress, see Appendix C filed in this Court under seal, and (2) did the *district court* have the power to order respondent to testify in open court? Neither of these issues was reached by the court below, though the decision by the court below in effect denied that the district court had this power based on the manner in which respondent was brought before the district court.

This approach to the issues made little sense, and the court below, in effect, ruled that the district court was without personal jurisdiction of respondent because respondent was before the court by way of subpoena served on him. (Respondent's assertion that "The United States Attorney accepted service [of the subpoena] on behalf of respondent . . . " (Br. at 2) is inaccurate. In fact, petitioner's counsel personally served the subpoena on respondent by placing it in respondent's hand.)

There can be no question but that, having been served personally with the subpoena *ad testificandum*, the district court had personal jurisdiction of respondent, and the issue thus clearly was presented whether *vel non* the district court possessed the power to issue to respondent its orders. No precedent of this Court, or any other court, deprived the district court of that power, but the court below never addressed that issue.

The district court had jurisdiction of respondent, and when respondent refused to obey the court's lawful orders the

district court unquestionably had the power to adjudge respondent in contempt of court.

Petitioner does not challenge the sections of the C.F.R. under which DOJ operates, or purported to operate in this case. Petitioner duly subpoenaed respondent, was entitled to respondent's testimony no matter what DOJ thought of that, and when the district court enforced petitioner's subpoena by making certain orders to respondent and respondent then disobeyed those orders, the district court properly exercised its power of contempt. The only parties before this Court are petitioner and respondent, and the only legislative enactment before this Court is Rule 45 of the Federal Rules of Civil Procedure. The provisions of the C.F.R. on which respondent relies simply are irrelevant to the district court's exercise of its power to enforce the provisions of Rule 45 and its power of contempt.

Just as the court below sought to shunt this issue onto the side track of procedural oblivion, respondent here also seeks to shunt the instant Petition into the bin of mootness. But the issues raised hardly are moot.

2. Because respondent's mootness argument (Br. at 7-8) is based on an invented false premise, and because in any event either mootness principles do not apply, or, if they apply, the "capable of repetition, yet evading review" exception to mootness is applicable, the issues before this Court are not moot.

First, respondent's contention that "the district court's orders were designed solely to compel respondent to testify at the trial," Br. at 7, is not accurate, but is respondent's precatory gloss that he constructs in order to be able to claim mootness. Nothing at all in the record supports this baseless assertion. In fact, the contrary is true.

The district court's first order, that respondent tell the district court on the record to be sealed, in chambers, but not under oath, what respondent knew of the facts of the incident that formed the basis for the pending trial, had nothing at all to do with compelling testimony, but rather had to do with the

district court being able to exercise its power under F.R. Evid. Rule 103.

Indeed, the district court stated the reasons for its first order: "to determine the validity of the DOJ's first order;" Appendix C at 1, and "to make other decisions required by the interests of justice in the case pending before the court, should it be finally determined that Agent Boeh will not be compelled to testify." *Id.* at 2. The district court further elaborated on its reasoning:

> The court's order was issued to enable the court to make informed decisions about the following issues: (1) whether the regulations upon which the DOJ relied were valid as applied to the exercise of discretion involved in this cases; (2) if the regulations were invalid as applied, whether, within what limits, and with what safeguards against impigement on law enforcement objectives, Agent Boeb should be compelled to testify; and (3) if Agent Boeh were not compelled to testify, whether a mistrial should be declared, or other action taken to prevent a miscarriage of justice. Specifically, the court sought to determine whether the information in Agent Boeb's possession was dispositive of the civil case.

Id. at 3. Thus, it was not the case that "the district court's orders were designed solely to compel respondent to testify." Br. at 7. Clearly, the first order was designed to enable the court to exercise its power, under Article III of the Constitution, as a federal court.

Respondent's disobedience of that order hardly is mooted by any subsequent events, and the conclusion of the civil proceeding below is not dispositive of whether the district court had the power to make the order it made or now has the power to punish as a contempt of court the disobedience of that order. Indeed, were this Court to decide that the issue of the first order is moot, there would be created what the Chief Justice of this Court characterized as a situation that "would produce results that were not merely odd, but positively absurd." *U.S. v. X-Citement Video, Inc.*, 115 S.Ct. 464, 467

(1994). It would be truly anomalous and absurd for respondent's refusal to obey the district court's order to be vouched-safe by the wholly fortuitous subsequent event of the losing defendants in the underlying civil case having decided to pay the judgments against them and not to appeal. Surely, the power and integrity of a federal district court cannot rest on such happenstance. Indeed, to hold that the first order would have been rendered moot by this happenstance would be equivalent of this Court reversing its recent decision disclaiming the use of a *vacatur* in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994). As in *Bonner*, because the public has an interest in the issue presented on this Petition, it would be wrong to permit an after-the-fact happenstance to render the issue presented moot.

Second, there is no record evidence that the district court's contempt orders to respondent were "designed solely [or at all] to compel respondent to testify at trial." Br. at 7. Indeed, as the district court stated on the record, its orders of contempt were for the sole purpose of enabling the court of appeals to reach the issues on the merits. (In fact, when the interlocutory, recalcitrant witness appeal first came before the court of appeals, the appeal was dismissed because there had been no finding of contempt. It was only after this procedural event that the district court adjudged contempt, and then solely to cause the court of appeals to decide the underlying issues of the district court's power.)

Thus, notwithstanding that the acts the district court ordered, if done, no longer would serve any purpose in the case in which the acts were ordered, the issues of whether *vel non* there was a contempt of the court's power and whether the district court still has the power to punish those contempts are not moot. Were they moot, then the absurd result would follow that one may with impunity disobey a federal court's lawful order, and get away with that, so long as sufficient time would pass so that the district court's orders no longer could have any substantive purpose. Such a premise would encourage those ordered to take action by federal courts in civil actions to follow the practice of criminals who bide their time in custody and who await the disbanding of grand juries.

Traditional mootness principles are not applicable here.

First, respondent's testimony is sought again, before the same district judge, on the very same topic, in a companion case in which this Court denied certiorari. *Wachs v. Trevino, By and Through Cruz,* 115 S.Ct. 32 (1994). This Court denied certiorari to a number of Los Angeles City Council members in *Wachs,* and now that case, based on the same underlying incident, *see Gomez v. Gates,* 804 F. Supp. 69 (C.D. Cal. 1992); *Trevino v. Gates,* 798 F. Supp. 621 (C.D. Cal. 1992); *Trevino v. Gates,* 23 F.3d 1480 (9th Cir. 1994), is set to go to trial. A subpoena *ad testificandum* for trial has been issued for respondent in that case. Thus, there is reason to expect that respondent's testimony on the same subject in future litigation again will be sought and again be compelled. *See Murphy v. Hunt,* 455 U.S. 478, 482 (1982). And, under *Hunt,* there is no mootness because the issue of the district court's powers cannot be said to be "no longer 'live' " or that "the parties lack a legally cognizable interest in the outcome" of whether or not respondent should be punished. *Id.* at 478. And, under *Hunt,* because "a favorable decision," *ibid.,* would vindicate the power of the district court, there still is a live question to be adjudicated.

The issues are "capable of repetition, yet evading review[,]" *id.* at 482, and thus this case falls within an exception to the mootness doctrine. When the elements of "challenged action . . . too short [in duration] to be fully litigated prior to its cessation or expiration and . . . a reasonable expectation that the same complaining party would be subjected to the same action again" combine, *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975), the "capable of repetition, yet evading review" exception to mootness is applicable.[1] Here, the district court is, in effect, the complaining

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[1] *"Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1979), suggests that the two bases for finding the events capable of repetition were independent. ('The controversy between the parties to this case is "capable of repetition" in two senses.' *Id.,* at 546." *Murphy, supra,* 455 U.S. at 486 n. 3 (Justice White dissenting). Here, because of the procedural facts of this case, and the two and one-half year delay by the court of appeals in rendering its written disposition, there is valid reason to construe the

party. Yet, because of the peculiar facts of this case, this Court should not invoke the doctrine of mootness because to do so would reward recalcitrance and delay and disserve justice.

The procedural framework of this case posits a Gordian Knot to be cut by this Court. Because the court below took two and one-half years to render its written disposition in which it then avoided deciding the issues before it, it potentially foreclosed review of the issues by this Court. Were a court of appeals again and again to do what the court of appeals in this case did, then the issues of which review is sought in this case never would be capable of being brought before this court because the underlying action in which the power of a district court to compel testimony of a federal agent in a civil case certainly would have concluded, thus enabling that agent always to claim mootness. In that scenario, as here, the issues of which review is sought never would be moot, and thus, never could be decided by this Court. That scenario, as demonstrated in this case, presents a reason for this Court to hold that in situations such as the one in this case, a district court's orders compelling a witness to provide first information and then testimony to the district court be capable of review by this Court no matter that the underlying proceeding has concluded. An order to testify in a civil case made by a district court, or an order by a district court that it be given information, *in camera* and to be sealed in order to enable the district court to carry out its functions under F.R. Evid. Rule 103, ought always to be reviewable by this Court so that one who chooses to disobey such orders always will do so at his or at her peril, and never will do so with the chance of impunity. The impossibility of such review

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two so-called "capable of repetition" factors to be independent and disjunctive, or to modify the second factor so that its "same complaining party" is not given the potential narrow meaning of "party to that litigation" so as to exclude the court from its meaning. Indeed, the court is a party in the real sense to its invocation of its power of contempt, and its power to elicit facts under seal in order to enable it to discharge its constitutional duties.

by this Court in effect strips the federal district courts of their inherent power to discharge their duties.

Any order in this case would be of more than academic force, *see State of North Carolina v. Carr,* 386 F.2d 129, 131 (4th Cir. 1967), because such an order would punish a contempt of court. No case stands for the proposition that orders punishing a contempt are of academic force only. That the testimony sought no longer can be of value to petitioner, or to the court, should not operate to deprive the district court of its ability to vindicate its own powers.

There is additional reason for this Court not to apply mootness doctrine to decline review, because "an order . . . lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." *NLRB v. Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 271 (1938). Indeed, because "compliance with an order . . . does not render the cause moot, depriving the Board of its opportunity to secure enforcement[,]" *NLRB v. Raytheon Co.,* 398 U.S. 25, 27 (1970), neither should disobedience of an order caught up in extensive appellate delay, as here, render the disobedience of the order moot. Application of mootness doctrine to the issues on this Petition both makes little sense and would perpetrate an injustice. There is a strong public interest in this Court resolving the issue of whether *vel non* F.B.I. agents, like other mortals, are subject to federal court orders, or are permitted in effect to decide for themselves whether they will obey those orders. These issues are likely always to be moot by the time they reach this Court, by respondent's reasoning, and thus, if respondent's reasoning is accepted, then this Court should apply the "evading review, capable of repetition" exception to mootness.

3. It is absolutely "essential that courts be able to compel the appearance and testimony of witnesses." *Shillitani v. U.S.,* 384 U.S. 364, 370 (1966). *See also, U.S. v. Bryan,* 339 U.S. 323, 331 (1950). And the spectre of punitive imprisonment, or other punitive (as opposed to coercive) action, must remain both real and enforceable in order for the courts credibly to have that power. Thus, it is not only the power of

"coercive imprisonment as applied to civil contempt [which] depends upon the ability of the contemnor to comply with the court's order[,]" *Shillitani, supra,* 384 U.S. at 364, that attends disobedience of civil contempt. Necessarily, there is inherent in the contempt power the power to invoke a punitive remedy. Petitioner has found no case that stands for the proposition that *only* coercive, and not punitive, consequences may attend orders to testify in civil actions that are disobeyed.

It would be fundamentally wrong to relieve from the power of contempt a recalcitrant witness and to permit him or her to escape the consequences of recalcitrance by virtue of the fortuitous event of settlement by the parties of the dispute in which the witness' testimony had been sought and been ordered. To do so would foster recalcitrance, and would emasculate the powers of the courts.

What is left in this case is not the coercive powers of the district court, but the punitive powers of the district court. There is no legitimate reason to put those powers in a null class.

4. This Court may "not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court." *X-Citement, supra,* 115 S.Ct. at 470. In this case, no court could impute to Congress in its enactment of the Administrative Procedure Act, 5 U.S.C. 701, *et seq.*, under whose so-called housekeeping provisions respondent based his disobedience of the district court's orders, an intent to subvert or to override or to make void the powers of the district court. This court never has ruled that the provisions of Section 301 or its predecessor operate to permit the result here sanctioned by the court below, nor has this Court ever considered at all the application of Section 301 or its predecessor to *testimonial* matters, as opposed to documents. See dissent of Judge Norris.

Because it cannot be said that "interim . . . events have completely and irrevocably eradicated the effects of the alleged violation [of the court's orders,]" *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979); because the integrity of the district court remains impugned; because

" '[c]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government[,]' " *Bowsher v. Synar,* 106 S.Ct. 3181, 3193-94 (1986) (quoting *INS v. Chadha,* 462 U.S. 919, 944 [1983]); and because this Court's "mootness cases . . . have established a powerful presumption favoring adjudication[,]" Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons,* 59 N.Y.U.L. Rev. 1, 27 (1984), this Court should grant certiorari in this matter. There is no doubt but that if this Court does not grant certiorari, no DOJ employee ever will obey a federal court subpoena, and all will "be free to 'return to [their] old ways' after the threat of a lawsuit has passed." *Iron Arrow Honor Society v. Heckler,* 464 U.S. 67, 104 S.Ct. 373, 375 (1983) (quoting *U.S. v. W.T. Grant,* 345 U.S. 629, 632 [1953]).

5. The "flexible character of Art. III mootness doctrine" encompasses consideration of the public interest in safeguarding fundamental constitutional rights, such as the right to compel and to have testimony in a civil action, *see, e.g., U.S. Parole Comm. v. Geraghty,* 445 U.S. 388, 400 (1980), and this Court must grant certiorari in order to confine the executive branch to its defined and proper place in our constitutional framework so that the public interest in its independent federal judiciary will be preserved.

The Petition for Certiorari should be granted.

Respectfully submitted,

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